United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-1468

United States Court of Appeals

For the Second Circuit

Docket No. 74-1468

(T-3378)

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of HAGEN PASTEWKA, Deceased, and MONICA PASTEWKA, Individually,

Plaintiffs-Appellants,

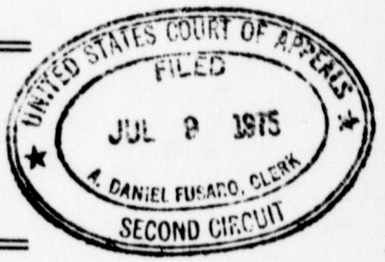
—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants-Appellees.

and Consolidated Cases.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



PETITION FOR REHEARING IN BANC OF PLAINTIFF-APPELLANT THOMAS I. FITZGERALD, FOR "DEATH CLAIMANTS"

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of HAGEN PASTEWKA, deceased, and MONICA PASTEWKA, individually,	:	
Plaintiff,	:	Docket No.
-against-	:	74-1468 (T-3378)
TEXACO, INC. and TEXACO PANAMA, INC.,	:	
Defendants.	:	

DEATH CLAIMANTS' PETITION FOR REHEARING IN BANC

Plaintiff-appellant Thomas I. Fitzgerald, Public Administrator of the County of New York and Administrator for the Estates of twelve deceased seamen, respectfully petitions this Honorable Court for rehearing in banc of its decision herein of June 25, 1975. (Separate petition is being filed on behalf of the appealing hull and cargo claimants. That petition is approved and also relied on by death claimants).

In an opinion by Mr. Justice Anderson joined by Mr. Justice Mansfield, with a dissenting opinion by Mr. Justice Oakes, the majority held that Texaco's motion to dismiss for forum non conveniens should be granted in this suit for damages by the estates of the twelve dead seamen, and by the hull and cargo owners against a Delaware corporation having a controlling base office in New York City, arising out of a collision involving a ship, previously sunk in shipping lanes on the high seas in the English Channel, and owned by the wholly-owned

subsidiary of defendant corporation Texaco. The claimed negligence of Texaco, predicated upon the United States statutory Death on the High Seas Act, 46 U.S.C. 761, et seq., and upon the general maritime law as interpreted by United States Courts, was committed by Texaco's high echelon employees in its New York office in failing to authorize the hiring a ship (the Smit salvage vessel Orca) to search for and mark its sunken hull after notifying the governmental agency (Trinity House) of the collision, knowing that Trinity House did not locate it and doing nothing to have the hull marked from the time of the initial collision until the second collision, some 27 hours later, about 24 hours after Trinity House dispatched the Siren and 15 hours after the Trinity House vessel advised that it hadn't found the sunken hull.

REASONS FOR REHEARING IN BANC

Death claimants join in requesting rehearing in banc because of the plain errors of law analyzed in the petition of the hull and cargo plaintiffs.

In addition death claimants petition for rehearing in banc on the basis of the following errors in the majority opinion filed June 25, 1975:

I. There is no precedent for dismissal for forum non conveniens of a suit against an American corporation based on United States law in favor of a foreign jurisdiction.

II. The majority decision deprives of any remedy a large class of claimants, relatives of deceased seamen.

III. The majority opinion approves the "Catch-22" decision below which dismissed for 'insubstantial' facts as to Texaco New York's control, while effectively denying the discovery needed to gain such facts.

THE FACTS

The majority opinion fails to appreciate the significance of the following basic facts:

1. 24 hours elapsed between dispatch of the Siren following Texaco's notice to Trinity House (App. 77a), and the collision next day between Brandenburg and the Texaco wreck (Majority Opinion, p. 4378).

2. During this time Texaco actually turned down an offer by Smit-Tak of its well-equipped salvage ship Orca, which would have found the Texaco wreck before Brandenburg hit it, if hired (App. 269a, 272a, 274a, 282a, 283a).

3. In the meanwhile, the Siren couldn't locate the wreck and was "mistakenly moored at the edge of an oil slick which she assumed indicated the location of the wreck . . ." (Majority Opinion, pp. 4377-8).

I. THERE IS NO PRECEDENT FOR DISMISSAL FOR FORUM NON CONVENIENS IN FAVOR OF A FOREIGN JURISDICTION OF A SUIT AGAINST AN AMERICAN CORPORATION BASED ON UNITED STATES LAW.

No case is cited by the majority opinion or by Texaco in which a suit against an American corporation, predicated upon United States law, has been dismissed on forum non conveniens in favor of a foreign jurisdiction.

Fitzgerald v. Westland Marine Corp., 369 F.2d 499, involved independent defendant Japanese and Canadian corporations, and was held to be governed by both Japanese and Canadian law for injury sustained by the plaintiff in Japan and Canada. No United States statutory law was applicable.

Domingo v. States Marine Lines, 340 F. Supp. 811, was a suit against an American corporation arising out of a collision in the Philippine territorial waters of Manila Bay. American law was accordingly not involved, but rather Philippine law. The case was dismissed because of the common sense rule that local courts, more knowledgeable and familiar with local law, should determine any conflict as to that law.

When both factors (American defendant and law) are bound together in one suit, death claimants know of no case that has been dismissed under forum non conveniens, and none has been cited. There has never, until this case, been a decision by an American Court remitting to a foreign jurisdiction a case involving construction of American law and involving solely an American defendant and its wholly-owned

foreign subsidiaries.

The majority decision is a grave step backward. Future litigation involving foreign law would appear now to be permitted here where there may be unidentified American "witnesses" to a transaction, and with American Courts asked to determine a foreign controversy having some vague contact with the United States. The doors of justice swing both ways.

The United States Courts should determine the rights of parties under the Death on the High Seas Act, 46 U.S.C. 761, et seq., Pet. of Resdal and Anderson, 291 F. Supp. 353 and The Vulcana, 32 F. Supp. 815.

If, as spelled out by the majority, the English Lord Campbell's Act is not applicable herein, will we have English Courts interpreting American law when our Courts are more knowledeable and familiar with the applicable American Death Act?

As the dissent correctly perceived, even under the excessively restrictive discovery procedures applied by the Magistrate below, the dominance of Texaco New York is clear. The dissent pointed out the myth of registry by a foreign wholly-owned corporation, created and controlled by American interests to avoid taxes. While the majority continued to point to the subsidiaries as being managed by an English corporation, the dissent rightfully spelled out the domination of both the managers and owners of the wreck by Texaco

in New York, where the power lay to make policy and to authorize action under the conditions following the initial Texaco Caribbean/Paracas collision. Even the sparse evidence appellants were allowed to obtain clearly showed that sole, prime, power rested with Texaco's officers in the New York office. The majority opinion's failure to see the matter in its true light is before the Court at this time.

The majority opinion ignored the many cases from this and other Courts that instruct us to look past the facade of nominal foreign registry and ownership and to consider the true owner as a United States corporation, Barthelomew v. Universe,263 F.2d 437 (2C); Hellenic v. Rhoditis, 398 U.S. 306; Zielinski v. Empresa, 113 F. Supp. 93; Pavlou v. Ocean, 211 F. 320, in which the various Courts suggested that the locale of the shipowner's base of operation was of prime importance and a substantial factor to be taken into account in considering whether there were sufficient contacts with the United States. The majority failed to give any weight whatever to Texaco's Delaware incorporation and its New York City based center of operation. "Texaco, Inc., has offices in New York, where its corporate and intercorporate offices are located", (Dissenting Opinion, p. 4391). " . . . the principal place of business of the parent corporation, Texaco, Inc., is in New York City, in the Southern District of New York," (Dissenting Opinion, p. 4387). The dissent found that location of the defendant's controlling office in New York, where its records, memos, communications with its other offices, officers, were all located, made New

York uniquely the proper forum, especially since the suit was predicated upon the failure of the officers in New York to consider and approve such marking procedure as would have located the sunken hull for the safety of other ships in the shipping lanes (Dissenting Opinion, p. 4391). The Dissenting Opinion properly considered the minimal effect of Trinity House not being a party, by showing its severely limited liability in any event and the irrelevancy of the initial collision to this lawsuit for Texaco's negligence following that collision (4392). The records of, the personnel who, and the corporate policies which ruled and controlled the activities of Texaco's corporate complex are all in New York. The availability of the American defendant and applicability of United States law is the real and important contact here, not unnamed, unidentified possible witnesses in England.

II. THE MAJORITY DECISION DEPRIVES OF ANY REMEDY A LARGE CLASS OF CLAIMANTS - DEPENDENT RELATIVES OF DECEASED SEAMEN.

The petition for rehearing of hull and cargo interests demonstrates that the law of this forum since 1951 gives a remedy to these plaintiffs for Texaco's fundamental negligence in failing actively and personally to locate its wreck, and that the law of England gives no remedy.

In addition certain potential death claimants as a group would be deprived under England's Lord Campbell's Act of the remedy they have under United States Death on the High Seas Act. The majority opinion at p. 4385 uses the expression "minimal possibility" that death claimants might be

"adversely affected by dismissal" as to any dependent relative other than spouse, child or parent. But it is a total and catastrophic loss of all recovery to brother, sister, grandparent, aunt, uncle and cousin of the deceased seamen (and possibly illegitimate children, dependent upon the interpretation given to the Lord Campbell's Act in England). While it is conjectural at this time only because the information was neither requested nor considered by the Court below and the proof of the numbers of relatives in that position was not provided (but could easily be if requested), it is inconceivable that in twelve families there is not even one person falling within the classification "or other dependent relative" under the Death on the High Seas Act, supra.

A dependent relative wholly deprived of his right to proceed will not view this result as any less disastrous merely because it is nicely couched as a "minimal possibility".

And if the majority opinion is correct (p. 4386) when it suggests that the British Courts will apply the Lord Campbell's Act only in cases involving British parties or vessels, and otherwise the law of forum "with the most significant contacts," does that also suggest that we should indulge in endless "renvoi," with the United States and English Courts each stating that the other has the most significant contacts? The realities of that possibility boggle the mind.

III. THE MAJORITY OPINION APPROVES THE "CATCH-22" DECISION BELOW WHICH DISMISSED PLAINTIFFS' ACTIONS FOR 'INSUBSTANTIAL' FACTS AS TO TEXACO NEW YORK'S CONTROL, WHILE EFFECTIVELY DENYING THEM THE DISCOVERY NEEDED TO GAIN SUCH FACTS.

As said in the dissent, Brandenburg plaintiffs and death claimants " . . . were effectively denied the opportunity to depose any of [Texaco's] officers regarding the issue of [Texaco/New York's] dominance and control of Texpan. . . Appellants have in my view been placed in a 'Catch-22' situation." (Dissenting Opinion, note 1, p. 4388).

The majority opinion does not take note of the position in which appellants were placed. Denied any opportunity whatsoever to depose Texaco witnesses (App. 255a), and allowed only five gutted interrogatories and two wholly insufficient documentary requests (App. 165a, 166a), appellants - without ever being allowed to discover what could or could not be added by Texaco's "phantom" witnesses - were strait-jacketed and could do nothing else but make out a weak evidential case as to Texaco's control of operations from New York. Their actions were dismissed not because the case itself was weak, but because the District Court denied over and over again (App. 161a et seq., 176a, 232a, 247a, 255a) the right to obtain information that would establish the existence and importance of New York witnesses and documents and the paucity of England's actual involvement.

Plaintiffs should rarely be deprived of their choice of forum. But - while paying lip service to that rule - the majority opinion nevertheless held that plaintiffs, who were deprived of the right to reply to defendants' arguments because of a denial of pretrial discovery, were not prejudiced! The proof of Texaco's authority in New York is in New York. While the majority opinion opines that the best proof should be found in England, that was a guess (and perhaps a hope) not substantiated by any facts, and it affirmed the rejection below of plaintiffs' position without allowing plaintiffs any evidentiary evaluation. The suggestion that depositions of underlings of a wholly-owned subsidiary corporation be taken in London in order to determine the extent of the subsidiary's supervisory management by its New York parent is simply not a realistic approach to the issue. Plaintiffs' request to depose that management in New York was denied by the District Court (App. 255a). It was almost an "Alice in Wonderland" decision, overlooking the true posture of the parent corporation in New York and the subservient position of the London personnel, who had no way of knowing what the New York management group was discussing, planning or doing about Smit's offer of the sophisticated "Orca" during the 24-hour period between Texaco's notice to the "pathetic" Siren, and Brandenburg's ultimate collision with the unlocated, unbuoyed wreck.

The proof of plaintiffs' allegations was insubstantial only because plaintiffs were denied the right to obtain that proof in the District Court; the majority opinion improperly affirms the effective denial of plaintiffs' right to obtain that evidentiary proof by pretrial depositions, interrogatories, production of documents and notice to admit.

The Court overlooked the crippling limitation placed upon the plaintiffs' efforts to provide information to the Court to establish an overwhelming contact with the defendant's New York based shipping complex.

The majority decision permitted the defendant to mislead this Court by vaguely suggesting that there are great numbers of foreign witnesses to the suit. How can it be challenged when the witnesses are unnamed and unidentified, when their testimony is unknown?

The defendants' position that the subsidiary corporations had all authority was likewise accepted without any proof whatever being offered, and with the denial of the plaintiffs' right of deposition to refute that position. This cast an impossible burden of proof upon the plaintiffs, rather than the burden being placed where it belonged - upon the moving party. (For detailed explanation of the extraordinary constriction of plaintiffs' discovery, see App. 236a-241a, and the Magistrate's and Court's disposition, App. 232a, 247a).

Both litigants and justice have in fact been dismissed on attorney's affidavits.

CONCLUSION

The dissenting opinion has acutely recognized that:

1. "Appellants' discovery below was substantially denied", so that appellants were "placed in a 'Catch-22' situation" (Dissenting Opinion, note 1, p. 4388), and were penalized for the absence of facts they were prevented from obtaining, but that

2. Nevertheless control by Texaco New York is clear (Dissenting Opinion, pp. 4387-8); and

3. There is " . . . a very grave danger that appellants will be precluded from recovery under the English law . . ." (Dissenting Opinion, p. 4393); and

4. "Justice . . . requires that we retain jurisdiction in the American Court where it was brought" (Dissenting Opinion, p. 4394).

Death claimants respectfully request that rehearing in banc be granted, and that an order be entered directing that the motion for forum non conveniens be denied and the case retained in the Court below for trial.

Dated: New York, New York
July 9, 1975

Respectfully submitted,

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Attorney(s) for

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